

OPINION AFTER TRANSFER FROM THE CALIFORNIA SUPREME COURT

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOSHUA DORVAL

on

Habeas Corpus.

D068961

(San Diego County  
Super. Ct. No. SCE333970)

ORIGINAL PROCEEDING in habeas corpus. Laura W. Halgren, Judge.

Relief granted.

Edward J. Haggerty, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief  
Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A.  
Swenson, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for  
Respondent.

## I.

### INTRODUCTION

In March 2014, Joshua Dorval pled guilty to one count of residential burglary (Pen. Code, §§ 459, 460)<sup>1</sup> (count 1) and admitted having suffered a prior strike (§ 667, subds. (b)–(i)) based on a 2002 conviction for grand theft of a firearm (§ 487, subd. (d)). In May 2014, the trial court sentenced Dorval to a stipulated term of four years in prison.

In July 2015, Dorval filed a motion to designate the 2002 conviction for grand theft of a firearm (§ 487, subd. (d)) a misdemeanor, pursuant to section 1170.18, subdivision (f). Dorval also requested that the court resentence him pursuant to section 1170.18, subdivision (a) by dismissing the strike (§ 667, subds. (b)–(i)) premised on the 2002 conviction.<sup>2</sup> The trial court designated the 2002 conviction a misdemeanor but denied Dorval's request to dismiss the strike and resentence him.

Dorval filed an appeal from the court's order. In our initial opinion in this matter, we rejected Dorval's contentions and affirmed the trial court's order.<sup>3</sup> (*People v. Dorval* (July 13, 2016, D068961) [nonpub. opn.].) The California Supreme Court granted review

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<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

<sup>2</sup> Section 1170.18 was added through the enactment of Proposition 47 on November 4, 2014 (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 1, p. 70), and became effective the next day (Cal. Const., art. II, § 10, subd. (a)).

<sup>3</sup> Dorval also filed a petition for habeas corpus (*In re Dorval*, D069314) in which he raised nearly the identical issue that he raised in the appeal. We summarily denied the writ petition for the reasons stated in the related appeal. That habeas proceeding is now final.

of our decision and ordered action deferred pending disposition of *People v. Valenzuela* (2016) 244 Cal.App.4th 692 (*Valenzuela*), review granted Mar. 30, 2016, S232900.

In July 2018, the Supreme Court issued *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), a consolidated decision in *Buycks*, *Valenzuela*, and *In re Guiomar* (S238888), regarding the effect of Proposition 47 on felony-based enhancements. (*Buycks*, *supra*, at p. 871.) As discussed in more detail in part III.A.2, *post*, the court held that a successful Proposition 47 petitioner could challenge a felony-based enhancement based on a subsequently reduced felony, in certain circumstances. (*Buycks*, at p. 879.)

In September 2018, the Supreme Court transferred Dorval's case back to this court with directions to reconsider the matter in light of *Buycks*. Dorval and the People each submitted a supplemental brief regarding the impact of *Buycks* on the issue that Dorval raised in his appeal.

In their supplemental responding brief, the People conceded that "Proposition 47 relief is available to [Dorval] . . . ." The People further acknowledged that this court may "construe [Dorval's] appeal as a petition for writ of habeas corpus and grant relief." Accordingly, in the interest of judicial economy, we construed Dorval's supplemental opening brief on transfer to be a petition for habeas corpus, issued an order to show cause, and permitted the parties to file appropriate pleadings. We now conclude that the petition for habeas corpus is meritorious and that relief is warranted. We vacate Dorval's sentence. We direct the trial court to dismiss Dorval's strike prior and to resentence him.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Dorval's 2002 conviction for grand theft of a firearm*

In October 2002, in San Diego County Superior Court case No. SCE223982 (2002 case), Dorval pled guilty to grand theft of a firearm (§ 487, subd. (d)).

#### B. *Dorval's 2014 residential burglary conviction and sentence*

In March 2014, in San Diego County Superior Court case No. SCE333970 (2014 case), Dorval pled guilty to first degree residential burglary (§§ 459, 460) (count 1) and admitted having suffered a prior strike (§ 667, subds. (b)–(i)), based on the 2002 conviction for grand theft of a firearm.

At sentencing in May 2014, the trial court imposed a stipulated sentence of four years, consisting of the low base term of two years on count 1, doubled under the Three Strikes law due to the prior strike.

#### C. *Dorval's initial appeal from the judgment*

On June 30, 2014, Dorval filed a notice of appeal (*People v. Dorval*, D066242) in the 2014 case. On January 7, 2015, upon Dorval's filing of an abandonment of the appeal, this court dismissed the appeal and issued the remittitur.<sup>4</sup>

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<sup>4</sup> On our own motion, we take judicial notice of the notice of appeal, order dismissing the appeal, and the remittitur in *People v. Dorval*, D066242. (See Evid. Code, §§ 459 ["The reviewing court may take judicial notice of any matter specified in [Evid. Code, §] 452"], 452, subd. (d) [permitting a court to take judicial notice of the "[r]ecords of (1) any court of this state"].)

The record in this case does not contain the appellate record in Dorval's original appeal from the judgment in the 2014 case. Moreover, in his supplemental opening brief

D. *Dorval's motion to designate the 2002 theft conviction as a misdemeanor and to recall the 2014 case and resentence him*

In July 2015, Dorval filed a motion to designate the 2002 conviction for grand theft of a firearm (§ 487, subd. (d)) a misdemeanor, pursuant to section 1170.18, subdivision (f), on the ground that the value of the firearm was less than \$950. (See § 490.2, subd. (a) ["Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor"].)

Dorval also requested that the court dismiss the strike (§ 667, subds. (b)–(i)) that was premised on the 2002 conviction and resentence him.

In August 2015, the court held a hearing and granted Dorval's request to have his 2002 theft conviction designated a misdemeanor. The court took under submission Dorval's request to dismiss the strike and recall and resentence him on the 2014 case. On September 22, 2015, the trial court entered a written order denying Dorval's request to dismiss the strike and recall and resentence him in the 2014 case.

E. *Proceedings on appeal from the order denying Dorval's request to dismiss the strike and recall and resentence*

Dorval appealed the trial court's September 22 order.

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on transfer, Dorval incorrectly stated that the 2014 case "was final at the time of the passage of Proposition 47 in November 2014."

Nevertheless, the People forthrightly acknowledged the existence of that appeal, and the lack of finality of that appeal as of the effective date of Proposition 47 in their supplemental responding brief on transfer from the Supreme Court. The People's candor serves the ends of judicial economy and is to be commended.

As outlined in part I, *ante*, in our initial opinion in this matter, we affirmed the trial court's order. The Supreme Court granted Dorval's petition for review and transferred the case to this court for reconsideration in light of *Buycks*. We construed Dorval's supplemental opening brief on transfer to be a petition for habeas corpus, issued an order to show cause, and permitted the parties to file appropriate pleadings.

### III.

#### DISCUSSION

A. *Pursuant to Buycks, we vacate Dorval's sentence and direct the trial court to dismiss Dorval's strike prior and to resentence him*

Dorval contends that "under the holding in *Buycks*, the misdemeanor reduction of Dorval's prior felony conviction warrants remand for resentencing . . . ." (Boldface & some capitalization omitted.) Dorval requests that we vacate his sentence in the 2014 case and direct the trial court to dismiss his strike prior and resentence him.

##### 1. *Governing law*

###### a. *Proposition 47 and section 1170.18*

Among numerous other provisions, Proposition 47 designated as misdemeanors certain theft crimes that were previously felonies. (See, e.g., § 490.2 [petty theft].) In addition, Proposition 47 created provisions permitting the resentencing of certain defendants (§ 1170.18, subds. (a), (b)) and authorizing the designation of certain prior convictions as misdemeanors (*id.*, subds. (f)–(h)). Under section 1170.18's resentencing mechanism, "[a] person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty

of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing" in accordance with the reduced penalties provided for various crimes contained in the statute. (*Id.*, subd. (a).) A person who satisfies the statutory criteria shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.*, subd. (b).)

Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application to have their felony convictions "designated as misdemeanors." (§ 1170.18, subds. (f)–(h).) Section 1170.18, subdivision (k) provides that convictions that are resentenced or designated pursuant to section 1170.18 "shall be considered a misdemeanor for all purposes," except that such resentencing shall not permit the person to possess firearms. Section 1170.18, subdivision (k) provides:

"(k) A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."<sup>5</sup>

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<sup>5</sup> Section 29800 et. seq. define various crimes pertaining to the illegal possession of firearms.

b. Buycks

In *Buycks*, the California Supreme Court granted review to consider "Proposition 47's effect on felony-based enhancements in resentencing proceedings under section 1170.18." (*Buycks, supra*, 5 Cal.5th at p. 871.) As relevant here, the *Buycks* court concluded that "Proposition 47's mandate that the resentenced or redesignated offense 'be considered a misdemeanor for all purposes' (§ 1170.18, subd. (k)) permits defendants to challenge felony-based section 667.5<sup>[6]</sup> . . . enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors." (*Ibid.*) The court further concluded that although "the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as 'a misdemeanor for all purposes' prospectively, . . . under the *Estrada*<sup>[7]</sup> rule, it can have retroactive collateral effect on judgments that were not final when the initiative took effect on November 5, 2014." (*Id.* at p. 883; see *id.* at p. 881 ["The *Estrada* rule rests on the presumption that, in the absence of a savings clause . . . , 'a legislative body ordinarily intends for ameliorative

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<sup>6</sup> Section 667.5 provides for the "[e]nhancement of prison terms for new offenses because of prior prison terms."

<sup>7</sup> (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*)). The *Buycks* court described the *Estrada* rule as being "a limited rule of retroactivity that applies to newly enacted criminal statutes intended to reduce punishment for a class of offenders." (*Buycks, supra*, 5 Cal.5th at p. 881.) The *Buycks* court explained further that, under the *Estrada* rule, "we presume that newly enacted legislation mitigating criminal punishment reflects a determination that the 'former penalty was too severe' and that the ameliorative changes are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,]' provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 881.)



changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not' "].) Thus, with respect to prison priors, the court held that section 1170.18, subdivision (k) "can negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor under the measure." (*Buycks, supra*, at p. 890.)

In applying this law to the facts in *Valenzuela*, the *Buycks* court explained that the defendant in that case was convicted of carjacking and other offenses in 2014, and the court imposed a prior prison enhancement for a 2012 conviction. (*Buycks, supra*, 5 Cal.5th at pp. 873–874.) After Proposition 47 went into effect and while her appeal was pending, the defendant successfully petitioned for the 2012 conviction to be redesignated as a misdemeanor. (*Buycks, supra*, at p. 874.) The California Supreme Court determined that "[b]ecause Valenzuela's judgment . . . was not final when Proposition 47 took effect, the *Estrada* rule applies to strike her section 667.5, subdivision (b) prior felony prison term enhancement." (*Id.* at p. 896.)

The *Buycks* court observed that "nothing in Proposition 47 expressly provides a mechanism for recalling and resentencing a judgment because a prior underlying felony conviction supporting an enhancement in that judgment has been reduced to a misdemeanor." (*Buycks, supra*, 5 Cal.5th at p. 892.) Nevertheless, the *Buycks* court explained "that the collateral consequences of Proposition 47's mandate to have the redesignated offense 'be considered a misdemeanor for all purposes' can properly be

enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect." (*Id.* at p. 895.)

## 2. *Application*

Dorval contends that under *Buycks*, section 1170.18, subdivision (k) provides that once a conviction is designated a misdemeanor (*id.*, subd. (g)), the conviction becomes a "misdemeanor for all purposes," (*id.*, subd. (k)) and thus, a previously imposed Three Strikes law sentence based on the prior conviction becomes invalid. Dorval further contends that because his 2002 conviction for grand theft of a firearm (§ 487, subd. (d)) has been redesignated as a misdemeanor, the trial court must dismiss the strike (§ 667, subds. (b)–(i)) premised on the 2002 conviction and resentence him.

The People state "the *Buycks* court's conclusion that a defendant could challenge a prison prior enhancement under [section 1170.18] subdivision (k) would also appear to apply to a strike prior enhancement." The People explain:

"The [*Buycks*] court reasoned that the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year prison prior enhancement. (*Buycks, supra*, 5 Cal.5th at p. 889.) Likewise, for a prior conviction to qualify as a strike offense, it must be an enumerated *felony*. (See §§ 667, subd. (b) ['It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious and/or violent *felony* offenses.'], emphasis added.) Thus, it does not appear there is any sound rationale for not applying the same analysis to a strike prior enhancement."<sup>8</sup>

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<sup>8</sup> The People make no argument that the retroactive effect of section 1170.18 is limited in the case of the determination of whether an offense is a strike, pursuant to section 667, subdivision (d)(1). (See § 667, subd. (d)(1) ["The determination of whether

The People further acknowledge that "Proposition 47 relief is available to [Dorval] through a petition for writ of habeas corpus because the judgment containing the strike prior enhancement [i.e., the 2014 case] was not final when this law took effect."

Accordingly, we conclude that because Dorval's 2002 conviction for grand theft of a firearm (§ 487, subd. (d)) has been redesignated as a misdemeanor, and the 2014 case was not final at the time Proposition 47 took effect, section 1170.18 subdivision (k) requires that the trial court dismiss the strike (§ 667, subds. (b)–(i)) premised on the 2002 conviction and resentence him. (See *Buycks*, *supra*, 5 Cal.5th at p. 895.)<sup>9</sup> Upon resentencing, the trial court shall not impose a sentence greater than four years. (§ 1170.18, subd. (e) ["Resentencing pursuant to this section shall not result in the imposition of a term longer than the original sentence"].)

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a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, *shall be made upon the date of that prior conviction*" (italics added)].) Accordingly, we need not, and do not decide, this issue. Rather, in accordance with the People's acknowledgment that the *Buycks* court's reasoning "would also appear to apply to a strike prior enhancement," we accept the People's concession that "Proposition 47 relief is available to [Dorval]."

<sup>9</sup> In light of our conclusion, we need not consider Dorval's argument that the "retroactive application of . . . section 1170.18, subdivision (k) is required . . . in order to avoid an equal protection violation."

IV.

DISPOSITION

The relief requested in Dorval's petition for habeas corpus is granted. Dorval's sentence is vacated. The trial court is directed to dismiss Dorval's strike prior and to resentence him to a term of no longer than four years.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.